

FLORIDA TOMATO EXCHANGE

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Docket Clerk
Marketing Order Administration Branch
Fruit and Vegetable Programs, AMS
U.S. Department of Agriculture
1400 Independence Avenue SW, Stop 0237
Washington, DC 20250-0237

**Re: Federal Register: June 29, 2006
(Volume 71, Number 125)
[Proposed Rules] [Page 37014-37016]
Docket No. FV06-966-1 PR; Tomatoes Grown in Florida; Partial
Exemption to the Minimum Grade Requirements**

Dear Sir:

The comments herein are submitted on behalf of the Florida Tomato Exchange (the Exchange). The Exchange consists of growers and shippers of tomatoes who represent a substantial volume of all tomatoes shipped out of the state of Florida, and during the winter months, we are the predominant source of fresh grown tomatoes in the United States.

Based on the information provided below, we ask the Secretary to reconsider and withdraw the proposed partial exemption that the minimum grade requirements and the proposal to amend Section 8e of the Agricultural Marketing Agreement Act of 1937 (AMAA). Alternatively, we ask the Secretary to abide by the letter and spirit of the AMAA and take no action in this matter unless and until the handler and owner of the Ugly Ripe™ (Ugly Ripe or Ugly Ripes) tomato exhausts his administrative remedies.

Marketing Orders

Marketing orders are designed to help stabilize market conditions for fruit and vegetable producers. The orders assist farmers in allowing them to collectively work to solve marketing problems. Industries voluntarily enter into these programs and choose to have Federal oversight of certain aspects of their operations. A marketing order is a legal instrument authorized by the U.S. Congress through the Agricultural Marketing Agreement Act of 1937. Marketing orders are binding on all individuals and businesses that are classified as "handlers" in a geographic area covered by the order.

Programs for fruits, vegetables and specialty crops are administered by local administrative committees, which are made up of growers and/or grower-handlers, and often a member of the public. Committee members are nominated by the industry and appointed by the Secretary of Agriculture.

The Florida Tomato Committee is the committee that administers the Florida Tomato Marketing Order (Order No. 966). The Committee has been in existence since 1955. The order is in effect from October 10 through midnight June 15 of each year, unless rescinded or amended. The marketing order authorizes the handling of Florida fresh market tomatoes by grade, size, quality, maturity, pack, and container. The geographic production area regulated by the marketing order is all parts of the state east of the Suwannee River. That means that no tomato can be shipped outside of the geographic production area from October 10 through June 15 unless it meets the marketing order standards. The minimum grade, size, quality and maturity requirements established under the order are also applied to imported tomatoes from October 10 through June 15. The order's container and pack requirements are not applied to imported tomatoes. It should be noted that nearly all of the domestically produced fresh tomatoes during this time period are grown in Florida.

Under the rules governing federal marketing orders, a grower can petition the administrative committee (in this case the Florida Tomato Committee) to grant a "Certificate of Privilege" to the marketing order. Certificates of Privilege can be granted for a number of reasons. For instance, they may be given to new varieties to see if they are viable in the marketplace. They can also be given to varieties that will clearly not be competing with the commodity being regulated as consumers utilize them in a different way. A good example would be the current exemption to the tomato marketing order for cherry tomatoes, as they clearly are not utilized in the same manner as round tomatoes.

Ugly Ripes

Beginning in the 2000/2001 season, Procacci Brothers applied for and was granted a certificate of exemption by the Florida Tomato Committee for a new variety of tomato they had developed (Ugly Ripes). The Ugly Ripes are an heirloom-type hybrid variety beefsteak-style tomato that are misshapen and have a concave stem and rigid shoulders (thus the name Ugly Ripe). While some of the Ugly Ripes did not meet size and grade standards under the marketing order, the Committee granted the certificate in order to allow Procacci Brothers to test market this new variety. During the season for which a Certificate of Privilege had been granted, the Committee studied collected inspection data and reviewed it to better understand the variety when compared to traditional tomatoes. The Committee granted a Certificate of Privilege for the next two marketing years as well (2001/2002 and again in 2002/2003). When the Committee met to approve the marketing order for the 2003/2004 season, Procacci Brothers again applied for a Certificate of Privilege for the Ugly Ripes. Given that Procacci had been able to test-market the variety for three years (enough time to gauge consumer interest) and that approximately 70% of the Ugly Ripes presented for inspection were meeting the marketing order standards and that the Committee determined the Ugly Ripe was a direct competitor with traditional Florida tomatoes that meet the standards, the Committee denied the request for another Certificate of Privilege. This denial meant that all Ugly Ripes grown in Florida would have to meet grade/size, etc. standards in order to be shipped and sold outside of the regulated production area. Any Ugly Ripes that did not meet the grade were still eligible to be sold within the regulated area.

Procacci Brothers appealed the decision to the U.S. Department of Agriculture (USDA) under a process set up in the Agricultural Marketing Agreement Act of 1937. This process is known as a 15A petition. At the same time (December 2003), Procacci filed lawsuits against USDA, members of the Florida Tomato Committee and their companies in hopes of having the court overturn the Committee's decision. Eventually, a District Court Judge dismissed the case against USDA, the Florida Tomato Committee, its members, and their companies. A short time later, Procacci withdrew their 15A petition from USDA.

Procacci again requested a Certificate of Exemption for the UglyRipe when the Committee met in December 2004. Once again, the request was denied. Three subsequent meetings of the Committee have occurred since that time including a meeting brokered by USDA Under Secretary for Marketing and Regulatory Programs Bill Hawks between the Committee and Joseph Procacci. Unfortunately, no resolution was reached.

The AMAA, as noted in the Proposed Rule (71 Fed. Reg. 37015), is the authority for marketing orders and amendments to them, and provides that administrative proceedings must be exhausted before parties may file suit in court. There is no other remedy process available under the AMAA. As of this date, Procacci Brothers has not filed a 15A petition to the most recent Florida Tomato Committee's decision. The Agricultural Marketing Agreement Act of 1937 gives the Secretary of USDA broad authority to revise/amend an administrative committee's marketing order. The final step in the 15A process; if the petitioner remains unsatisfied is the U.S. District Court decision.

While tomatoes imported into the U.S. during this time period are subject to the marketing order, imported tomatoes grown in a greenhouse are not. This is an important distinction in this particular case since Procacci has grown greenhouse Ugly Ripes in Mexico for importation into the U.S. Were the marketing order to be amended to provide an exemption for grade/size/etc. for Ugly Ripes, it would mean that Ugly Ripes could be grown in the ground in Mexico and imported into the U.S. from October 10 to June 15 without being subject to the marketing order.

Marketing Order No. 966 is in place to assure that during Florida's growing season, wherever you buy a tomato in this country you always get a consistent product that is of the highest quality. As noted above, there is an administrative appeal process set up for cases such as this where disagreement occurs. Withdrawal of the Proposed Rule presents an excellent opportunity for USDA to send a strong message indicating their confidence in the marketing order program to growers and handlers alike.

The Proposed Rules ignores material facts, previous findings and conclusions on the substantive, pertinent issues, and contains, and is based on, misstatements of facts. It also conflicts with the declared purposes of the AMAA, is in conflict with provisions of the AMAA, and is based on an untested program designed to assist with marketing, not to support a change in a marketing order or in U.S. grade standards. The results from this program are flawed and should not be used as a basis for an exemption. In addition, adoption of this proposal will harm small tomato growers.

AMS has chosen to ignore the particular history of the Ugly Ripe tomato with the Florida Tomato Committee. First, AMS notes "Ugly Ripe tomatoes are a trademarked tomato variety bred to look and taste like an heirloom-type tomato." These tomatoes are not a "trademarked variety." The trademarks (Attachment A) do not refer to any variety being trademarked. The only things being trademarked are the words and even then, the right to use the word "ugly" is disclaimed.

Second, the statement that this tomato is a “variety bred to look and taste like an heirloom-type tomato” is meaningless and it is highly inappropriate to make this statement and in part use this as a basis for this proposal. Notwithstanding the owner’s intent to breed a tomato to look and taste like an heirloom-type tomato, the fact is that there is no definition or consensus of what an heirloom-type tomato looks like and certainly no standard as to what an heirloom-type tomato tastes like.¹ In addition, AMS staff has bought into the hype surrounding this tomato when it states that it is unique and varies in appearance and shape (“depending on the time of years and weather Ugly Ripe tomatoes ... vary in shape and appearance.” Therefore, Ugly Ripes “can have difficulty meeting the shape requirements of the U.S. No. 2 grades.”

Every tomato grown in Florida varies in shape and appearance depending on the time of the year and weather and they all have difficulty making grade when that happens. The Ugly Ripe tomato is neither special nor unique when it comes to shape and appearance. Again, these statements are intentionally prejudicial and are designed to support the conclusions in that this tomato is unique or unique enough to be different than the other varieties of tomatoes subject to the Federal Marketing Order No. 966. Not only are they not so different as to warrant an exception, they are similar enough to these tomatoes that the Secretary must uphold the many decisions made by the Florida Tomato Committee denying the request to exempt this tomato from having to comply with Marketing Order No. 966.²

The Ugly Ripe tomatoes are similar to other regulated hybrid tomatoes. And, in the only factual report on the Ugly Ripe, the Florida Tomato Committee’s, over a three-year trial period, found that an average of 72.6 percent of the Ugly Ripes graded a U.S. No. 2 or better.

The Florida Tomato Committee (FTC or Committee) consists of growers appointed by the Secretary to consider and decide issues of importance to growers regulated under Marketing

¹ In fact, as far as taste is concerned, there is no basis in fact that the Ugly Ripe tomato tastes like an heirloom-type tomato. The only independent prominent study regarding the taste of Ugly Ripe’s versus commercially grown tomatoes indicates that the taste of Ugly Ripe tomato falls below the taste of several commercial varieties of tomatoes (Attachment B). Certainly, taste is a quality issue and clearly AMS in this proposal is seeking to support this large, multi-national conglomerate in promoting “continued innovation within the industry;” but, if that is the case, then AMS in following its precedent with this proposal would be required to provide an exemption to any company which produced the best tasting tomato or a different size, shape or quality standard so long as AMS’ IP program can isolate a unique trait for this tomato.

² The Following meetings had up or down votes on an exemption of some type for Ugly Ripe tomatoes:

1. June 13, 2002, on a motion to deny the exemption for Ugly Ripe tomatoes the Committee voted nine (9) to deny and three (3) to approve. The motion carried and the exemption was denied
2. August 22, 2002, on a request by USDA to look at the Ugly Ripe tomatoes for one more year, the Committee voted on a motion to grant a one year Certificate of Privilege exemption for Ugly Ripe tomatoes. The motion passed nine (9) votes for and two (2) opposed and a one year exemption was granted.
3. September 4, 2003, on a motion to deny an exemption for Ugly Ripe tomatoes the Committee voted nine (9) to deny and three (2) to approve. The motion carried and the exemption was denied.
4. December 5, 2003, on a request by USDA to look at the Ugly Ripe tomatoes for one more year, the Committee voted on a motion to grant a one year Certificate of Privilege exemption for Ugly Ripe tomatoes. The motion failed with three (3) votes for and seven (7) against.
5. January 5, 2005, on a motion to grant an exemption for Ugly Ripe tomatoes under Certificate of Privilege and under the Identity Preservation and Biotechnology Verification Program, the Committee voted three (3) for and eight (8) against. The motion failed.
6. April 19, 2006, on a motion to grant an exemption for shape for Ugly Ripe tomatoes with the requirement of an Identity Preservation and Biotechnology Verification Program, the Committee voted five (5) for, three (3) against and one (1) abstention. The motion failed.

Order No. 966. Their job is to assure orderly marketing of tomatoes in the regulated area during the season.

The Committee also has the authority to issue exemptions from the order requirements for specific purposes such as picking, processing or the development of experimental markets.

Based on the request from Gargiulo, Inc.,³ certificates were granted to allow Ugly Ripes to be shipped exempt from the order's shape requirements based in Gargiulo's claim that Ugly Ripes have "some difficulty" in meeting the U.S. No. 2 grade requirements from shape. We note the original requestor admits only some Ugly Ripes were having difficulty meeting the grade standards. This admission coupled with the Commission's three-year report on Ugly Ripes, conclusively proves that only some Ugly Ripes will not meet the U.S. No. 2 grade standard. Thus, the proposed rule, if adopted, does not justify exempting every Ugly Ripe tomato. Such an unnecessary, wholesale exemption is not needed and is certainly not justified by the facts before AMS.

On or about December 2003, AMS took a position on this issue:

"USDA Position: The order is used to establish minimum quality requirements for fresh tomatoes to ensure customer satisfaction and improve grower returns. The U.S. No. 2 minimum grade requirement has been determined to be an appropriate quality standard. The Committee is appointed by USDA to administer the order in the interests of the Florida tomato industry. USDA supports the Committee's decision that Ugly Ripe tomatoes be subject to the same requirements as other tomatoes grown in Florida."

There is no reason to overturn AMS' decision and the numerous decisions of the Committee which represents the interests of the tomato industry. And, AMS has offered no proof that Ugly Ripes should not be subject to the same requirements as other tomatoes grown in Florida.

Administrative Appeal

The owner of the Ugly Ripes has failed to comply with the requirements of 7 U.S.C. § 608c(15)(A) in that he has not exhausted his administrative remedies as required by § 608c(15)(A).

The owner has failed to file a "written petition with the Secretary of Agriculture" stating that the Florida Tomato Marketing Order issued by the Secretary of Agriculture in 1987 is not in accordance with law and seek a change to the order or seek exemption from this order. There has been no administrative hearing before an Administrative Law Judge, nor has the Secretary made any ruling. Attempts by the owner to lobby senior officials at USDA, exertion of political pressure by a former high official from USDA, and efforts to use the IP Program are not a substitute for the "written petition" required by Section 15(A). Nor has there been a formal ruling by the Secretary on a petition which is also required by Section 15(A) and 15(B). Congress intended that this process be used to resolve complaints concerning decisions made by a marketing order committee. There is no doubt the Secretary is aware of this provision. In an action brought against USDA and the Secretary by the owner of Ugly Ripes, the Secretary

³ We believe Gargiulo, Inc. is owned or controlled by Procacci Brothers.

⁵ Procacci Brothers Sales Corporation v. Ann M. Veneman, Secretary of Agriculture, et al., Civil Action No. 2003-CV-06894 (USDC, ED PA, 2004).

successfully argued and the Court agreed that the owner of the Ugly Ripe tomato had failed to exhaust his 15 (A) administrative remedies on the very issues raised in this proposal.⁵

And, there is no doubt the owner of Ugly Ripes is aware of his obligation to file a Section 15(A) petition because he did exactly that on a prior decision regarding the very same issues covered by this Proposed Rule.⁶

So, the Secretary of Agriculture on the very issue covered in this Proposed Rule, argued that the owner of Ugly Ripes must exhaust his administrative remedies including a hearing and a decision by the Secretary before further action could be taken to obtain relief from a decision denying an exemption to Procacci Bros. for the Ugly Ripe tomato by the Florida Tomato Committee.

The Secretary erred in not requiring the 15(A) process to be followed. In addition, by eliminating this process, the Secretary impermissively has exceeded his authority and has set an undesirable precedent eliminating the necessity of exhaustive administrative remedies under the AMAA for all challenges to all marketing orders. The Proposed Rule directly conflicts with the 15(A) process.

Agricultural Marketing Agreement Act of 1937 (AMAA)

The AMAA is intended “to establish and maintain such orderly marketing conditions for agricultural commodities in interstate commerce as will establish, as the prices to farmers, parity prices,” and “to improve the purchasing power of farmers.” (emphasis added).

The AMAA’s declared policy further is “... to protect the interest of the consumer by (a) approaching the level of prices which it is declared to be the policy of Congress to establish ... by gradual correction of the current [price] level at as rapid a rate as the Secretary of Agriculture deems to be in the public interest and feasible in view of the current consumption demand in domestic and foreign markets,” and “authorizing no action under this title which has for its purposes the maintenance of prices to farmers above the level which it is declared to be the policy of Congress to establish in subsection (1) of this Section.” (emphasis added);

“(3) ... to establish and maintain ... such minimum standards of quality and maturity and such grading and inspection requirements for agricultural commodities ... as will effectuate such orderly marketing ... as will be in the public interest;”

“(4) ... to establish and maintain such orderly marketing conditions for any agricultural commodity ... in the interest of producers and consumers, an orderly flow of the supply thereof to market throughout its normal marketing season to avoid unreasonable fluctuations in supplies and prices;” (emphasis added) and

“(5) ... to continue for the remainder of any marketing season or marketing year, such regulation pursuant to any order as will tend to avoid a disruption of the orderly marketing of any commodity and be in the public interest ...”

The Proposed Rule is authorized by the AMAA (7 U.S.C. §§ 601-674). The declared policy of the AMAA basically is to establish and maintain orderly marketing conditions so that farmers will receive higher prices. The policy is for the benefit of farmers who produce a covered commodity for sale in interstate commerce. Nowhere in AMAA’s Declaration of Policy is a statement that the Secretary shall take an action to help a single corporate farmer against the

⁶ In re Petition of Procacci Brothers Sales Corporation, Gargiulo, Inc. and Ag Mart, Inc. n/k/a Santa Sweets Inc., 2004 AMA Docket No. F&V 966-1 (2004). This petition was withdrawn later.

interests of the industry, which is exactly what this Proposed Rule does. The Proposed Rule runs directly counter to AMAA's Declaration of Policy.

The Proposed Rule does not establish maintain, or support "orderly marketing conditions." It does the exact opposite by permitting a partial exemption to a part of the Marketing Order. It will encourage growers to seek partial exemptions to other parts of the Marketing Order, including U.S. grade standards, not for innovative purposes, but to market more of their product to detriment of other growers. We have no doubt that an effort will be made to market U.S. No. 3's that resemble Ugly Ripes.

The Proposed Rule is not protecting "the interest of the consumer" by approaching the level of prices which it is declared to be the policy of Congress by the "gradual, directions of the current levels at as rapid a rate as the Secretary ... deems to be in the public interest and feasible" This policy statement is designed to raise the prices received by all farmers, not just a single farmer as the Proposed Rule requires. To the extent that Ugly Ripes compete with other tomatoes grown in the regulated production area at the same time and are sold into the same stores and compete for shelf space at the same time, the Proposed Rule will have the opposite effect resulting in lowering prices or eliminating at least some of our growers' sales. If a customer visits a store looking to buy 2-lbs. of tomatoes and chooses 2-lbs. of Ugly Ripes, he or she will not then buy Ugly Ripes competitor's tomatoes, regardless of price. The Declaration of Policy provides authority to the Secretary to establish and maintain such production research, marketing research, and development projects, such containers and pack requirements, minimum standards of quality and maturity "as will effectuate such orderly marketing ... as will be with the public interest." This policy statement is directed to maintaining and improving orderly marketing for the regulated industry -- not for a single grower.

The Declaration of Policy statement authorizes the Secretary to promote an orderly supply of each marketing order commodity to market throughout its normal marketing season to avoid unreasonable fluctuations in supplies and prices in the interest of producers and consumers.

The Proposed Rule does nothing to address orderly marketing "in the interest of producers." In fact, the Proposed Rules ignore the collective wisdom of the Committee on behalf of all the producers who on many occasions determined that the producers would be better served denying the exemption to allow Ugly Ripes to escape the standards applicable to all other producers. Again, we note the only unbiased, independent public report on the marketing of Ugly Ripes indicated that approximately 70% of Ugly Ripes made the grade and the remainder could be and likely were sold in Florida further supporting the Committee's decision.

In summary, marketing orders are designed to help growers help themselves. Marketing orders are authorized by Congress and Congress has directed the Secretary to oversee all marketing orders in accordance with the Declaration of Policy of the Act.

The Secretary has exceeded his authority under the Act because the proposal fails to adhere to Declaration of Policy in the AMAA, assists only a single entity in the industry and, fails to protect and support in any manner the declared interests of the growers.

Identity Preservation (IP) Program

In the Proposed rule, AMS refers to a Committee recommendation prior to the 1998-99 season that the minimum grade be increased from a U.S. No. 3 to a U.S. No. 2. AMS noted that members agree that increasing the grade requirements was beneficial to the industry and in the marketing of Florida tomatoes. But, "some" said that "a large part of the volume of the standards commercial varieties of tomatoes which fail to make the grade are rejected because of

their shape and appearance. The Proposed Rule continues in the same paragraph and states that consequently, there was some industry concern that providing an exemption for the Ugly Ripe tomato could result in the shipment of U.S. No. 3 grade tomatoes of other varieties, contrary to the objectives of the exemption and the order.” AMS then notes the producers of Ugly Ripes “pursued entry into USDA’s Identity Preservation (IP) Program, [t]o address this concern.”

Since the paragraph in the Proposed Rule begins with a discussion of a Committee recommendation prior to the 1998-99 season and continues with comments made by the members, it appears AMS is addressing a concern raised by Committee members prior to the 1998-99 season. At a minimum it is unclear what is the concern being addressed and/or what time frame of concern. A review of the Minutes of the Committee dated September 5, 1997⁷ reported that the Marketing Subcommittee supported a recommendation to eliminate the packing and shipping of U.S. No. 3’s. The Motion carried 10-Yes and 2-No votes. The minority opposed the action because “they believed there is a significant market for U.S. No. 3’s while the majority in favor of the action believed there was not.” There were no statements made by members that a large part of volume of tomatoes that fail to make grade are “rejected because of their shape and appearance.” These comments are nowhere to be found in connection with the elimination of No. 3’s and, in any case, reported comments by unidentified members of the Committee are not indicative of a majority of the Committee and are not adequate to support overturning a valid decision of the Committee.

The Proposed Rule further states that because there was “some industry concern” that the shipments of Ugly Ripes “could result in the shipment of U.S. No. 3’s of other varieties contrary to the objectives of the exemption and the order.”

To say that “some” concern “could” result in the shipment of No. 3’s is inadequate factually and legally to overturn five decisions by the Committee based on facts and arguments as required under the AMAA.

We suggest that use of the IP program is insufficient as a matter of fact and a matter of law to alter a well-founded legitimate decision of the Federal Marketing Order Committee. We also believe that the IP program was not intended to be used as a basis to undermine a valid marketing order. There is no provision in the AMAA to consider this information from the IP Program. In addition, there is no provision in the AMAA, in Marketing Order No. 966, or, importantly, in the Proposed Rule which would address problems or defaults by Ugly Ripe during the season in complying with the IP Program.

The IP Program originally was known as the Identity Preservation and Biotechnology Verification Program. To our knowledge, the use of this program by Ugly Ripes’ owner is the first and only time this program has been used.

The IP Program is a voluntary, third-party auditing program. It does not include any provision for use in a Marketing Order. The program “provides assurance to the company of product identity based on [a] desired attribute.”⁸ Neither the IP Program nor AMS in the Proposed Rule has identified the desired attribute of the Ugly Ripe tomato. Nor, have they indicated how the AMS lab linked DNA to the specific, unique trait or traits of the Ugly Ripe tomato.

⁷ A review of the Minutes of the Florida Tomato Committee’s Annual Meeting of September 11, 1998 reveals no comments for or against elimination of No. 3s.

⁸ Presentation by Marlene Betts, Office of Identity Preservation and Biotechnology Verification to the Fruit and Vegetable Advisory Committee, July 14, 2004.

The IP Program verifies that “a company’s document procedures are operating as planned.” Id. In this case, the IP Program Office indicates the Ugly Ripe owner has complied with the Program and that the verification at every stage from seeds to production and processing to distribution. But this is not really accurate. The IP Program stops at the packing house door. It does not cover any stop beyond the packing house. Such stops normally include shipment on a truck, offloading at a repacker facility or wholesale distributor, then trucked to a retailer’s central warehouse, then trucked to individual stores. At none, not one of these locations, is the Ugly Ripe tested by this Program.

The IP Program Office touts the program as raising “the level of customer confidence in the end product,” and increasing “the probability of meeting customers’ needs.” Ugly Ripes’ owner has developed a strong marketing message to the ultimate consumer – the person who buys the Ugly Ripe tomato at the grocery store. But, it is an admitted fact that the IP audit program does not cover the many times the Ugly Ripes are handled between the packinghouse and consumer. So, from a consumer’s perspective, a statement that the IP Program verifies that the tomato paid for at the grocery store and even labeled as an Ugly Ripe does not guarantee it really is an Ugly Ripe tomato. And, if the Ugly Ripes are commanding higher prices, then that will provide a strong incentive to violate the Marketing Order by shipping out-of-grade tomatoes that look like Ugly Ripes. And, it is a fact that there are tomatoes grown today that aren’t shipped because they do not make the No. 2 grade but might well be shipped if the price is right. And, they will look like an Ugly Ripe tomato.

We also note that in the IP Program for Ugly Ripes there are farm locations outside of the production area covered by Marketing Order No. 966. And, we note that audits were performed in one or two packing houses in Nogales, Arizona. We do not believe audits were performed on the Ugly Ripe seed, or during the production process of the Ugly Ripe tomatoes packed in the Nogales packing house(s).⁹ And, as noted above, no audit was performed on the tomatoes after they were shipped from these and all the other identified packing houses.

Thus, while the IP Program may provide useful information to the Ugly Ripes’ owner, it was never intended to be used in providing a basis for an exemption from a Federal Marketing Order. And, even if it were, there are problems with the IP Program itself which does not justify its use here.

The IP Program’s description on the AMS website states “the program also affords participants opportunities to verify a product’s unique quality trait, such as variety.” And, the site notes the IP service provides traceability of the company’s product’s unique value added characteristic . . .” Again, we believe that in this case AMS’ lab has not provided a link between the DNA and the unique quality trait or the unique value added characteristic of the Ugly Ripe tomato.

“The benefits of value-added out put traits can only be captured if the purity of the product is maintained throughout production and marketing . . .”¹⁰ And, marketing means from seed to the end-user or customer. The IP Program in this case simply fails to track and preserve

⁹ Importantly, the Inspection Service at the border must reject Ugly Ripe tomatoes grown in Mexico if they fail to meet the U.S. No. 2 grade standard, even if it is labeled as an Ugly Ripe tomato, unless the IP Program verifies the identity of the Ugly Ripe tomato when delivered to the Inspection Service and again at any other delivery point. We also note that the Inspection Service at the border only inspects a small percentage of any incoming shipment. Without verification by the IP Program at the border, there is no basis for an exemption for Ugly Ripe tomatoes entering the U.S. from Mexico.

¹⁰ Identity Preservation of Agricultural Commodities, Agricultural Biotechnology in California Series, Publication 8077, University of California, Division of Agriculture and Natural Resources, Produced by Seed Biotechnology Center, UC Davis, 2002.

the genetic or process identity from the seed to the shopper who buys the tomato at the grocery store.

The owner of the Ugly Ripe does not challenge the Committee's finding that Ugly Ripes make the U.S. No. 2 grade. He argues that the "characteristics [of the Ugly Ripe tomato] do not permit this variety to meet this grade standard in an economically viable manner" (emphasis added).¹¹ Inherent in this statement is the admission that some, maybe most, of the Ugly Ripe tomatoes meet the U.S. No. 2 grade statement. The Committee itself audited the shipments of Ugly Ripes over several years. When every Ugly Ripe tomato could be shipped, the Commission's report concluded that more than 70% made U.S. No. 2 grade. This finding has not been disputed. Nor is it disputed that the remainder of the Ugly Ripe tomatoes during this test period could be sold in Florida. The same is true today without the proposed exemption.

The issue for the owners seems to be: how many Ugly Ripe tomatoes must meet the U.S. No. 2 grade standard to be "economically viable." Apparently, 70% is not enough. However, the real question is: if 70% of the Ugly Ripes make the U.S. No. 2 grade, can the remainder be sold in the Florida market. While this question has not been answered, we believe that they can all be sold here. And, all the greenhouse Ugly Ripe tomatoes grown in Mexico can be sold in the U.S. or in Mexico. There is no evidence to the contrary. Thus, there is no basis, much less a compelling reason, to change the Marketing Order 966 as proposed.

And, a tomato that makes grade 70% of the time is not unique in a marketing order sense. There are many varieties with unique or special characteristics that are grown and marketed under the Marketing Order and meet the U.S. No. 2. grade. To allow the owner of one variety to sell all his tomatoes and not exclude those that fail to make grade, is to punish the growers and packers of other unique or special varieties who must abide by the Marketing Order. This does not make for orderly marketing, the bedrock of all marketing orders. Certainly producers of other varieties will refer to this Proposed Rule to justify their efforts to exempt their tomatoes with or without the IP program because of the implication here that orderly marketing is no longer important or even relevant to marketing orders.

The IP Program is set up to assist companies in the marketing of commodities that have unique traits. But, the fact is that the Ugly Ripe tomato is a hybrid and there is nothing unique about a hybrid tomato from a DNA marker standpoint. We are not aware that such markers distinguish the fasciated shape of the Ugly Ripe tomato. We are, however, advised that there may be a marker linked to one of the two fasciated fruit shapes reported in the literature. But, if this is true, this would not be unique as they are found in many varieties fruits, including tomatoes.

If AMS' Lab found some unique markers in the Ugly Ripes, we do not believe these markers have been linked to any unique trait or value added characteristic in the Ugly Ripes. Before the IP Program can be used to justify an exemption, such link or links must be proven.¹²

If the marker(s) distinguish the Ugly Ripe tomato from typical Florida varieties, by itself, this doesn't mean that the Ugly Ripe tomato is itself a unique category or variety of tomato. In fact, all tomato varieties can be fingerprinted.

While technology exists to identify different shapes, there is nothing unique about the Ugly Ripe shape. Their shape may vary more than some other varieties of tomatoes, but to

¹¹ Letter from Santa Sweets, Inc., dated March 23, 2006, signed by Joseph G. Procacci, Chairman of the Board to Mr. Reginald C. Brown, Manager, Florida Tomato Committee (Attachment C).

¹² In addition, for the IP Program to be effective in support of an exemption to the Marketing Order, it must be expanded from seed to end-user, which is not the case for Ugly Ripes grown in the U.S. and in Mexico.

attribute that to breeding is simply not supportable. To say that Ugly Ripe tomatoes are different than some other tomatoes is true but meaningless. This only means there are some differences in their genetic background. And, in any case “uniqueness” in this variety depends solely on what other varieties of tomatoes it has been compared to.

Many varieties of crops, including all tomato varieties, have unique DNA fingerprints. If the Proposed Rule goes forward, it will provide a basis for other growers to claim the uniqueness of their variety(ies) to obtain an exemption for “roughness” or not being “reasonably well formed.”

The IP Program is designed to be used by participants on a voluntary basis to help them “deliver a product that meets customers’ expectations.” It was not designed to change the marketing order system. The application of the IP Program fails on the merits in that the markers are not linked to Ugly Ripes “unique quality trait,” and the coverage of the Program is not broad enough to assure the end-user that he or she is receiving an Ugly Ripe tomato. In addition, the use of this Program to exempt a single, large corporation to avoid the requirements of a marketing order for a product that is not really unique and be marketed under the present Marketing Order, runs counter to the Declared Policy of the AMAA, is disruptive of, and harmful to, orderly marketing for small growers and handlers, and unnecessarily creates a loophole which will allow others to avoid the Marketing Order requirements further exacerbating the stability provided by the Marketing Order.

Initial Regulatory Flexibility Act Analysis

The Proposed Rule notes that AMS followed the requirements of the Regulatory Flexibility Act (RFA) in considering “the economic impact of this action on small entities” (emphasis added).

Sec. 603(a) of the RFA notes that the initial analysis “shall describe the impact of the proposed rule on small entities. And, Section 603(b) identifies what items are to be covered in the analysis such as, a description of the reasons why action by the agency is being considered, a description of and where feasible an estimate of the number of small entities to which the proposed rule will apply, an identification of all relevant Federal rules which may duplicate, and, if there is an overlap or conflict with the proposed rule.

And, the analysis shall contain a description of any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic of the proposed rule on small entities. Alternatives that should be discussed include: the establishment of differing compliance or reporting requirements; or an exemption from coverage of the rule, or any part thereof, for such small entities.

The Proposed Rule notes the majority of handlers and producers of Florida tomatoes may be classified as small entities. AMS notes that proposed change would increase the volume of Ugly Ripes, and would help increase shipments and availability of Ugly Ripes for consumers at a small increase in costs for producers and handlers of Ugly Ripes. Therefore, the benefits of this proposal “should more than offset the associated costs.” This may be true for Ugly Ripes’ owner but it is not true for the rest of the small entities that grow tomatoes in Florida.

AMS states the purpose of the RFA is “to fit regulatory actions to the scale of business subject to such actions in order that small businesses will not be unduly or disproportionately burdened.” Again, the owner of Ugly Ripes is not a small business and the small businesses in the industry are likely to be negatively affected if the Proposed Rule is adopted.

There is only one company that is directly involved with this exemption. See Procacci Petition, footnote 4, infra.

In paragraph No. 1 of the Procacci Petition, petitioners acknowledge that Ag Mart is now known as Santa Sweets, Inc. and argue that the Committee “refused to grant Procacci a certificate of privilege or exemption ... for Procacci’s popular Ugly Ripe™ heirloom tomato.” Id. We note again that the Ugly Ripe™ tomato is not an heirloom tomato and that the variety is not trademarked.

So, Procacci Brothers Sales Corporation (Procacci Bros.) considers itself as the aggrieved party in this action, the subject of which is being addressed by this Proposed Rule.

Procacci Bros. and the affiliated companies named are part of the Procacci Bros’ corporate empire. It is not a small business by any standard.

The small businesses that will be affected by the Proposed Rule are the “majority of handlers and producers [that] may be classified as small entities,” as noted in the Proposed Rule. But, the economic impact on these small businesses is not addressed anywhere in the Proposed Rule. We believe there will be a direct, immediate, and significant economic impact on a number of small businesses if the Proposed Rule is adopted. Ugly Ripes, at a minimum, will compete with commercial varieties of tomatoes for shelf space. If Ugly Ripes command more shelf space, it is most likely that the shelf space will be taken away from the tomatoes grown and sold at the same time as Ugly Ripes and they are grown by the Florida tomato growers regulated by this Marketing Order.

AMS considered one alternative to the Proposed Rule and that was “not to provide an exemption from shape requirements for Ugly Ripe tomatoes.” But, AMS fails to consider that the alternative was approved on five separate occasions by the Committee representing the entire industry.¹³ We agree if the alternative presented in the Proposed Rules was adopted, the volume of Ugly Ripes would increase and the shipments of Ugly Ripes would increase, as would the availability of these tomatoes for consumers. And, there would be no increase in costs associated with the IP program – to the owner of Ugly Ripes. And, we know there will be economic harm to our growers, many of whom are small businesses, as a result.

If the alternative was adopted, the only issue would be how many Ugly Ripes would fail to make the U.S. No. 2 grade and what would happen to them. Recall that 70% plus make the grade. The answer is that every one of these “rejected” Ugly Ripes could be sold in Florida. And, if they are as good as their owner says they are, they will sell them all, at a premium price. Again, this highlights the fact that there really isn’t a problem and that the Committee’s decision should be upheld.

Summary

In summary the Proposed Rule: will not help the Florida Tomato Industry meet domestic market needs; will not increase returns to producers; will not provide consumers with higher quality tomatoes; will not improve the marketing of Florida or foreign produced tomatoes; will not protect the market from depressing prices; will not help with orderly marketing in the industry; will lower the grade standards and will not improve the overall quality of tomatoes in

¹³ On more than one occasion, USDA determined that the Committee’s actions in denying this exemption was done fairly and in accordance with the law. The Secretary’s own lawyer noted that “[t]he Agricultural Marketing Agreement Act of 1937 [citation omitted] and the Order Regulating Handling of Tomatoes Grown in Florida, and the rules and regulations promulgated thereunder [citation omitted], as interpreted by the respondent [USDA] and the Florida Tomato Committee were and are fully in accordance with the law” (emphasis added). Respondent’s Answer, Procacci Petition.

the fresh market channels; will not improve the overall pack or appearance of fresh market tomatoes; will harm Florida's growers and handlers and will not benefit all producers and handlers both in prices received and in terms of quality; will benefit only a single large corporation; will disproportionately and unduly burden small businesses; discriminates against small business in that such businesses cannot afford to develop a tomato similar to the Ugly Ripe tomato, nor can they afford to avail themselves of the IP Program; and, is fundamentally unfair because the action assists a single large corporation to the detriment of many small businesses.

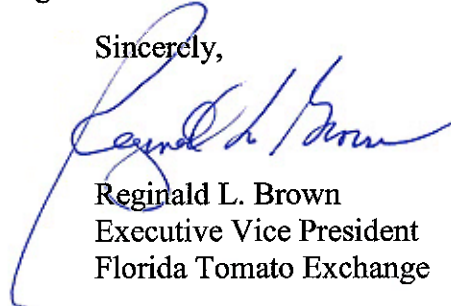
The Proposed Rule is contrary to the Declaration of Policy of the Agricultural Marketing Act of 1937 and violates the letter and spirit of the AMAA by allowing the Ugly Ripe tomato to avoid the administrative remedy provided by the AMAA, petition the Secretary in a 15A proceeding. In addition, the Proposed Rule improperly and unfairly relies on an audit program maintained by the Identity Preservation Program in AMS, and this program is flawed on the merits and in practice because it does not audit from seed to end-user. Even if the Program is found to be applicable, its use in conjunction with the enforcement of the Marketing Order is unworkable, does not provide for contingencies such as a failure to comply with the IP Program, and is likely to encourage and result an increase shipments of U.S. No. 3's similar to Ugly Ripes contrary to the partial exemption and Marketing Order.

Conclusion

In view of the foregoing, based on the information provided herein, we respectfully ask you to withdraw this proposal or, alternatively, before considering this proposal, require the Ugly Ripe owner to follow the administrative remedy provided in the AMAA.

Thank you for considering our comments.

Sincerely,

A handwritten signature in blue ink, appearing to read "Reginald L. Brown", is written over the typed name and title.

Reginald L. Brown
Executive Vice President
Florida Tomato Exchange

cc: Florida Delegation

Attachments



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Attachment A

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Typed Drawing

Word Mark UGLYRIPE TOMATOES
 Goods and Services IC 031. US 001 046. G & S: Fresh tomatoes. FIRST USE: 19990101. FIRST USE IN COMMERCE: 19990101
 Mark Drawing Code (1) TYPED DRAWING
 Design Search Code
 Serial Number 76472380
 Filing Date December 4, 2002
 Current Filing Basis 1A
 Original Filing Basis 1B
 Published for Opposition June 17, 2003
 Registration Number 2809257
 Registration Date January 27, 2004
 Owner (REGISTRANT) Gargiulo Inc. CORPORATION DELAWARE 15000 Old 41 North Naples FLORIDA 34110
 Attorney of Record James R. Meyer
 Disclaimer NO CLAIM IS MADE TO THE EXCLUSIVE RIGHT TO USE "TOMATOES" APART FROM THE MARK AS SHOWN
 Type of Mark TRADEMARK
 Register PRINCIPAL
 Live/Dead Indicator LIVE

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[REV DOC](#) [NEXT DOC](#) [LAST DOC](#)[Logout](#) Please logout when you are done to release system resources allocated for you.[Start](#) List At: OR [Jump](#) to record: **Record 2 out of 2**[TARR Status](#) [ASSIGN Status](#) [TDR](#) [TTAB Status](#) (Use the "Back" button of the Internet Browser to return to TESS)

Typed Drawing

| | |
|--------------------------|---|
| Word Mark | UGLY RIPES |
| Goods and Services | IC 031. US 001 046. G & S: Fresh tomatoes. FIRST USE: 20000300. FIRST USE IN COMMERCE: 20000400 |
| Mark Drawing Code | (1) TYPED DRAWING |
| Design Search Code | |
| Serial Number | 76169931 |
| Filing Date | November 22, 2000 |
| Current Filing Basis | 1A |
| Original Filing Basis | 1A |
| Published for Opposition | July 30, 2002 |
| Registration Number | 2638450 |
| Registration Date | October 22, 2002 |
| Owner | (REGISTRANT) Gargiulo Inc. CORPORATION FLORIDA 15000 Old 41 North Naples FLORIDA 34110 |
| Attorney of Record | James R Meyer |
| Disclaimer | NO CLAIM IS MADE TO THE EXCLUSIVE RIGHT TO USE "UGLY" APART FROM THE MARK AS SHOWN |
| Type of Mark | TRADEMARK |
| Register | PRINCIPAL |
| Live/Dead Indicator | LIVE |

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**CONTINUED EVALUATION OF
TOMATO LINES THAT EXHIBIT A
FRUITY/FLORAL FLAVOR
CHARACTER WITHIN A BALANCED
SUGAR, ACID AND VOLATILE
PROFILE FOR DEVELOPMENT OF A
PREMIUM COMMERCIAL VARIETY**

Elizabeth A. Baldwin, USDA/ARS
Citrus & Subtropical Products Laboratory
Winter Haven, FL

John W. Scott, University of Florida
Gulf Coast Research & Education Center
Bradenton, FL

Abstract. Tomato fruit were grown in replicated plots and the University of Florida Gulf Coast Research and Education Center in Bradenton, in Homestead and in Wimauma (fall, 2004, winter 2005 and spring, 2005, respectively). Fruit were analyzed by experienced sensory panels for flavor rating and for chemical components including color, lycopene, solids, individual sugars, titratable acidity, individual acids, and aroma volatiles. Crimson (high lycopene) genotypes with a good sugar/acid balance and a plum tomato with a fruity/floral character were rated along with tomatoes typical of the Florida industry or typical varieties found in supermarkets. FL 8153 again received high ratings by an experienced panel (now for the fourth, fifth and sixth seasons) and were found to be high in sugars, high to intermediate in acids, and high in red color, high in the red pigment lycopene, and aroma compounds. Fla. 8153, a crimson hybrid and possible release candidate for this fall, was rated in the top group and 'Ugly Ripe' in the lowest group for sweetness and flavor in all three seasons and locations. Similar results for Fla. 8153 were observed last year. Fla. 8344 is a plum tomato that has exhibited elevated expression of the fruity/floral char-

acteristic that has been difficult to obtain, and showed high levels of fruity volatiles.

The Florida tomato industry would gain market share with a premium tomato product that combined the health benefits of high lycopene and improved flavor quality. Past experienced sensory panels have shown a preference for tomatoes with a good sugar/acid balance such as Fla. 8153 that was rated in the highest group for flavor and/or sugars in spring 2003 and spring and fall, 2004 as noted in previous reports. Obtaining lines with the fruity/floral note has been difficult due to environmental effects on the trait. We believe that the addition of such a note to tomatoes with a good sugar/acid background would result in a tomato that would be preferred by a majority of consumers. Spiking studies have identified the volatiles that contribute to these desired aroma notes. In this study, we continued to look at genotypes with high lycopene backgrounds, good horticultural characteristics, a good sugar/ acid balance, and sometimes a fruity/floral flavor note that would differentiate a potential release from the rest of the fresh tomato market. High lycopene tomatoes may garner health benefits due to the anti-oxidant, anti-cancer activity of this pigment. Furthermore, the lycopene pigment is responsible for the red color of tomatoes, giving a good appearance, and serves as a precursor for important flavor compounds. This means that high lycopene cultivars may result in healthier, better flavored, and more attractive tomatoes.

Methods. Tomato (*Lycopersicon esculentum* Mill.) genotypes were grown in a completely randomized block design with two blocks and 5 to 10 plants per plot at the University of Florida Gulf Coast Research and Education Center in Bradenton in fall of 2004, Homestead in winter and Wimauma in spring of 2005. Cultivars, were sampled in the field from both blocks, and informally evaluated for flavor by the breeder. Geno-

types with superior flavor were emphasized for comparison with standard varieties. In all three seasons a comparison was also made with store-bought 'Ugly Ripe' tomatoes, currently popular in supermarkets.

Tomatoes were analyzed by an experienced panel of 25-30 panelists who, sampled tomato wedges, which represented at least four fruit per cultivar. Sub-samples were taken three times during the panel session and prepared for analyses of color and flavor components by measuring solids, sugars, acids, color, lycopene, titratable acidity and aroma compounds with refractometer, HPLC, chromometer, spectrophotometer, titrator and gas chromatograph (GC).

Results. For fall 2004, the experienced panel rated Fla. 8408 (assessed by the breeder as having good flavor in the field)

and 8153 (possible release hybrid) highest for flavor and sweetness. 'Ugly Ripe' was rated lowest for flavor, sweetness and acidity. Florida 47, Florida 91 and 'Solar Fire' were intermediate (Table 1). For winter 2005, Fla. 8153 was rated highest for flavor and was in the top group for sweetness and acidity. 'Ugly Ripe' was rated lowest for flavor and sweetness, but was not significantly different from 'Sanibel' and Florida 47 for flavor and from Florida 47 for sweetness (Table 2). For spring 2005, Fla. 8153, 8393 and 8408 were rated highest for flavor and sweetness and 8393 for acidity. Again 'Ugly Ripe' was rated lowest for flavor and sweetness, but was not significantly different from Florida 47 for flavor or sweetness (Table 3).

Table 1. Experienced panel evaluation of selected tomato genotypes for sweetness, acidity, and overall flavor in fall 2004. Ratings on a 1-9 scale where higher numbers indicate more sweetness and acidity and preferred flavor quality.

| Genotype, Breeder comments | Flavor | Sweetness | Acidity |
|------------------------------------|---------------------------|---------------|---------------|
| Fla. 8408, good flavor | 5.77 a^z | 4.59 a | 4.68 a |
| Fla. 8153, high lycopene, balanced | 5.35 a | 4.70 a | 3.70 bc |
| Florida 47 | 4.43 b | 3.78 bc | 4.13 ab |
| Florida 91 | 4.35 b | 4.48 ab | 4.39 ab |
| Solar Fire | 3.74 bc | 4.13 ab | 3.35 c |
| Ugly Ripe | 3.35 c | 3.22 c | 3.35 c |

^zMeans separation in columns by Duncan's multiple range test at $P \leq 0.1$.

Table 2. Winter 2005, see caption for Table 1 for details.

| Genotype, Breeder comments | Flavor | Sweetness | Acidity |
|------------------------------------|---------------------------|---------------|---------------|
| Fla. 8153, high lycopene, balanced | 6.03 a² | 5.10 a | 4.00 a |
| Solar Fire | 5.00 b | 4.86 ab | 3.03 b |
| Sanibel | 4.45 bc | 4.28 bc | 3.38 ab |
| Florida 47 | 4.33 bc | 3.67 cd | 3.83 a |
| Ugly Ripe | 3.83 c | 3.23 d | 3.70 a |

²Means separation in columns by Duncan's multiple range test at $P \leq 0.1$.

Table 3. Spring 2005, see caption for Table 1 for details.

| Genotype, Breeder comments | Flavor | Sweetness | Acidity |
|-----------------------------------|---------------------------|---------------|---------------|
| Fla. 8393, good flavor | 5.38 a² | 4.52 ab | 5.28 a |
| Fla 8153, high lycopene, balanced | 5.35 a | 4.62 a | 4.41 b |
| Fla. 8408, good flavor | 5.17 a | 4.83 a | 3.79 b |
| Florida 47 | 4.00 b | 3.93 c | 3.76 b |
| Ugly Ripe | 3.35 b | 3.55 c | 3.90 b |

²Means separation in columns by Duncan's multiple range test at $P \leq 0.1$.

Chemical data for fall 2004 (sugars, acids and color) tomatoes sampled by the experienced panel showed that lines Fla. 8153, Fla. 8408 and 'Solar Fire' had the highest sugars and sucrose equivalents (indicator of sweetness) and 'Ugly Ripe' the lowest, matching the sensory data. Fla. 8408 had the highest citric acid levels (Figure 1). Fla. 8153 had the lowest hue (i.e., most red color) and lycopene (red pigment). Fla. 8408 was highest in citric acid, which was probably why it was rated highest in acidity. For volatiles, Fla. 8153 was high in 1-octen-3-one (mushroom, sweet), while 8408 was high in hexanal, 2+3-methylbutanal, 1-penten-3-one, and geranylacetone (green and fruity volatiles).

Chemical data for winter 2005 showed that Fla. 8153 was highest in sugars (Figure

2) and sucrose equivalence, while 'Ugly Ripe' was lowest. Fla. 8153 was also highest in citric acid levels, which reflected the high rating for acidity. Finally, Fla. 8153 was highest in lycopene (Figure 3), although there was not much difference in hue. For volatiles, Fla. 8153 was high in methylbutanal, 1-penten-3-one, β -ionone, 2-phenylethanol (fruity volatiles), and 2-isobutylethiazole (earthy tomato). Florida 47 was also high in 1-penten-3-one, 1-octen-3-one, 6-methyl-5-hepten-2-one, geranylacetone (fruity volatiles), and 2+3-methylbutanol (off-flavor) and low in β -ionone. 'Ugly Ripe' was low in hexanal, 2+3-methylebutanal, and 1-penten-3-one, but high in β -ionone.

Chemical data for spring, 2005, Fla. 8393 was highest in total sugars and sucrose equivalents followed by Fla. 8153 and Florida 47. The other tomato varieties were much lower in sugars including 'Ugly Ripe'. Fla. 8393 was high in titratable acidity and citric acid. These data explain why Fla. 8153 and 8393 were rated high for sweetness and why 8393 was rated high for acidity, but not why Fla. 8408 was rated high for sweetness. For volatiles, Fla. 8153 was high in hexanal, *cis*-3-hexenal (green volatiles), 1-penten-3-one, and 1-octen-3-one (mushroom, fruity, sweet). Fla. 8393 was high in methional (earthy, potato), *trans*-2-*trans*-4-decadienal, 2+3-methylbutanal, linalool, and geranylacetone (fruity volatiles). Fla. 8408 was high in hexanal (green), methional (earthy, potato), 2+3-methylbutanal, 1-penten-3-one, 1-octen-3-one, geranylacetone, 2-phenylethanol (fruity, mushroom, sweet),

ethanol, *cis*-3-hexenal (green), 2-isobutylthiazole (earthy tomato), and 2-phenylethanol (fruity ketone volatiles shown in Figure 4). Perhaps all these volatiles made this line taste sweeter than expected from its sugar levels. 'Ugly Ripe' was also high in *cis*-3-hexenal, 1-octen-3-one, 6-methyl-5-hepten-2-one, and 2-isobutylthiazole.

When comparing the plum fruity floral line (Fla. 8344) to its non-fruit iso-line counterpart (Fla. 8343), sugars, acids, and color were similar, however 8344 was higher in 6-methyl-5-hepten-2-one and geranylacetone (fruity volatiles) and had 1-octen-3-one and β -damacenone (mushroom, fruity, sweet), while 8343 had none. The iso line (8343) had more 1-penten-3-one (green, fruity). One of the crosses with the 8344 fruity line also had β -damcenenone (4211) and the other high β -ionone (4215) (Fig. 5).

Figure 1. Fall 2004 organic acids

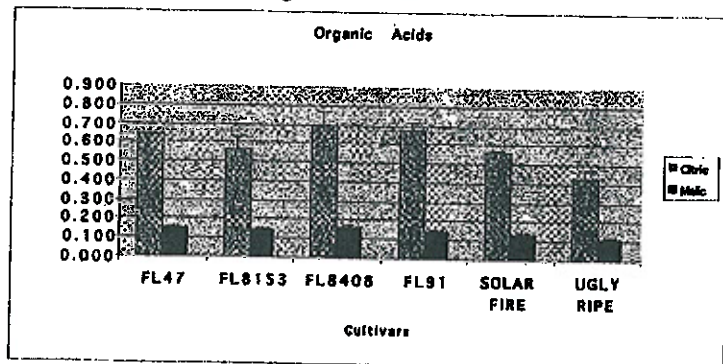


Figure 2. Winter 2004 sugars: glucose and fructose.

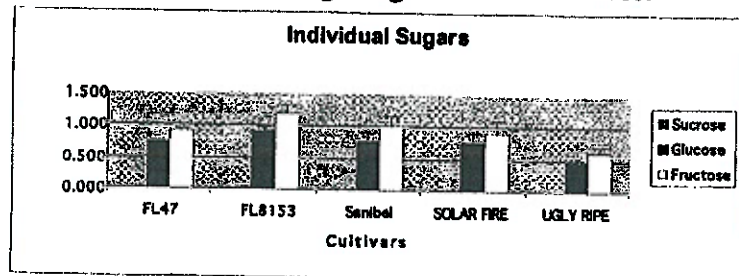


Figure 3. Winter, 2005 color

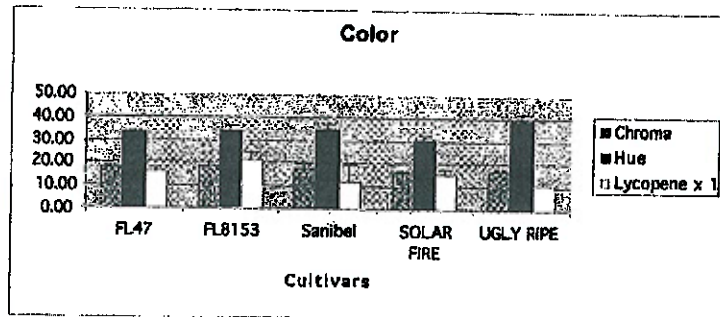


Figure 4. Spring 2005 ketone volatiles

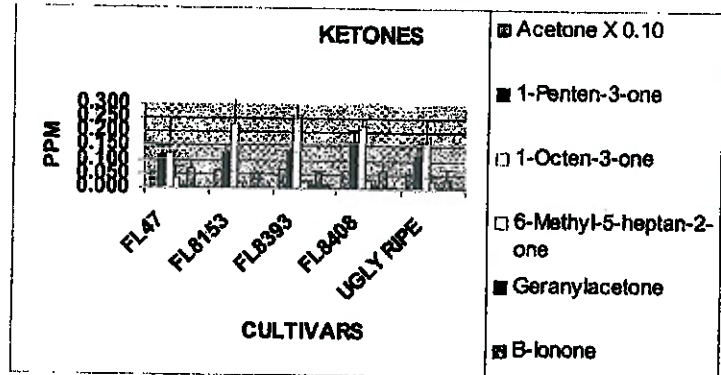
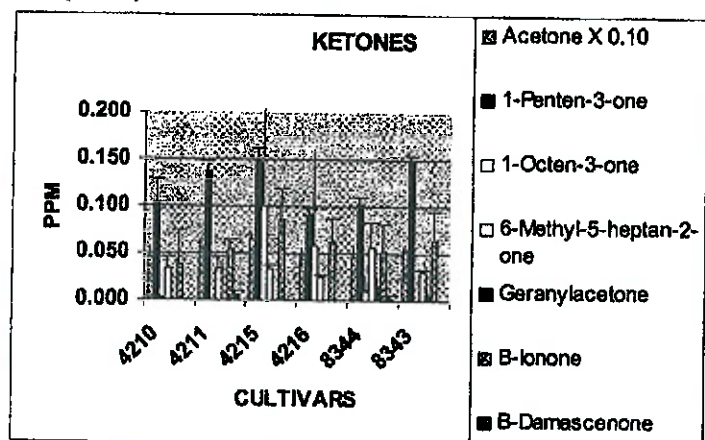


Figure 5. Fall 2004 plum tomato: 4377 = fruity floral line (Fla. 8344); 4411 = "iso" line (Fla. 8343) and 4211, 4215 = crosses with fruity floral line (8344); 4210, 4216 = crosses with "iso" line (8343)





Attachment C

March 23, 2006

VIA TELECOPY 407-660-1656

Mr. Reginald L. Brown
Manager
Florida Tomato Committee
4401 East Colonial Drive
Orlando, Florida 32814-0635

Re: Application for Amendment of Marketing Order 966, Tomatoes Grown in Florida

Dear Mr. Brown:

This submission is made on behalf of Santa Sweets, Inc. (Santa Sweets) and seeks amendment of Marketing Order 966, Tomatoes Grown in Florida. The purpose of this amendment is to provide a mechanism by which participants in the U.S. Department of Agriculture (USDA) Identity Preservation (IP) Program may be excused from those portions of the U.S. Grade Standards, i.e., shape, that may be inapplicable to particular identified and identifiable tomato varieties. This amendment to Marketing Order 966 would provide a long-term solution to issues presented by new innovative tomato varieties, foster development of new and innovative products for the Florida tomato industry, provide additional opportunities for Florida growers and shippers, and promote consumer choice. The proposed regulatory change is included in this submission, below. We respectfully request that the Committee act on this request within the next fifteen days.

The basis for this amendment to the Marketing Order would be participation in a voluntary, fee-based U.S. Department of Agriculture (USDA) inspectional program. The Identity Preservation Program is designed to provide a mechanism for U.S. government certification of particular attributes of fruits and vegetables, as explained below. There has been a recurring question that permitting the UglyRipe™ to be shipped during the regulated season would be merely a stalking horse for sub-grade tomatoes to flood the market. The USDA-audited certification program puts that concern to rest for once and for all; the UglyRipe™ is a genetically identified and identifiable tomato, a different variety that should not be subject to the shape standard any more than the Roma or San Marzano. The UglyRipe™ is a different type of tomato, and should be treated the same way that cherry tomatoes, grape tomatoes, and on-the-vine tomatoes are treated — as exempt from those portions of the grade standards that cannot apply to that type of tomato because of the characteristics of the tomato.

Letter to Mr. Reginald L. Brown
March 23, 2006
Page 2

USDA's Identity Preservation Program will be able to provide the Florida Tomato Committee with assurance that the marketing of the UglyRipe™ tomato during the Florida tomato season will not result in the unintended introduction of below-grade tomatoes into the marketplace by other domestic or foreign producers.

USDA Identity Preservation Program

According to USDA's own materials on the Identity Preservation Program:

The program requires participants to develop a comprehensive documented quality management system according to [Agricultural Marketing Service] specifications. Federal auditors verify the effectiveness of the program through an initial validation audit and periodic audits thereafter. These standards help ensure consistent auditing practices and promote international recognition of audit results.

The Identity Preservation auditing service is voluntary. The service provides participants with independent, third-party verification of the segregation of the company's product's unique value added characteristic at every stage from seed, production, processing, to distribution. The program assures buyers through laboratory testing and a heavily documented audit program that the identity of the product is preserved from the time the seed was purchased through product distribution.

<http://www.ams.usda.gov/fv/ipbv.htm>.

In December 21, 2005, Santa Sweets received notification from USDA that it had completed audits for adherence to the company's quality manual and the Identity Preservation Program. That notification recounted that USDA had confirmed unique DNA markers establishing that domestically grown UglyRipe™ tomatoes have unique DNA markings specific to that particular variety. In addition, USDA had inspected and audited Santa Sweet's seed source, transplant company locations, and farms in Florida and New Jersey.

The notification, which is Attachment 1 to this submission, reads, "Your company officially has full program status." (emphasis in original). A subsequent certificate was issued by USDA in January 2006 (Attachment 2). Santa Sweets has been inspected, audited, and certified as a full program participant in the Identity Preservation Program. The identity of the UglyRipe™ is now

Letter to Mr. Reginald L. Brown
March 23, 2006
Page 3

documented to the satisfaction of the United States Department of Agriculture; it should be recognized in the Florida Tomato Marketing Order.

Under the Identity Preservation Program, the Committee and the Florida tomato industry will have the assurance that inadvertent introduction of below-grade tomatoes does not occur from other domestic or foreign sources. The UglyRipe™ will be inspected as to standards other than grade related to shape, and each shipment will carry certification of compliance with the conditions of the Identity Preservation Program.

Procedural Background

As the Committee is aware, Certificates of Privilege were issued for the 2000-2001, 2001-2002, and 2002-2003 Florida tomato seasons to Gargiulo, Inc. (Gargiulo), an affiliated company of Santa Sweets. The Certificates of Privilege cited 7 C.F.R. § 966.54, Shipments for Special Purposes, as the basis for the Certificates. The 2001-2002 Certificate permitted shipment of Florida tomatoes for "Pickling, Charity, Processing & Research" purposes. The 2002-2003 Certificate permitted shipping for "Pickling, Charity, Processing and Experimental" purposes and even recognized the UglyRipe™ tomato as a distinct type of tomato permitted to be shipped out of the regulated area. The research and experimental purposes for the Certificates was to determine whether a market could be established for the heirloom-type UglyRipe™.

The UglyRipe™ has been an unqualified success. During the three seasons in which Certificates of Privilege were issued, net planted acres increased from 49 in 2000-2001 to 293 in 2002-2003 within the regulated area. At the request of several retailers, including Albertson's, Pathmark Stores, Publix, Shaws Supermarkets, Shop Rite, and StopNShop, Gargiulo sought and received PLU number 3423 for the UglyRipe™. Retailers have assured Santa Sweets and their affiliated companies that if the UglyRipe™ is available this winter, these retailers will market the UglyRipe™.

Gargiulo applied for a Certificate of Privilege for the 2003-2004 Florida Tomato Season. On November 14, 2003, the Administrator of USDA's Agricultural Marketing Service (AMS) wrote to the Florida Tomato Committee (FTC) requesting that the Committee grant a Certificate of Privilege for the 2003-2004 season. The basis for that request was that an additional Certificate would enable AMS to gather additional information to determine whether heirloom and heirloom-type tomatoes, including the UglyRipe™, could be distinguished during the inspection and grading process from other commercial tomato varieties under the Order. As the Committee is aware, that request was turned down in a seven-to-three vote in a December 5, 2003, FTC meeting.

After the vote, already planted tomatoes were unsaleable outside of the regulated area of Florida by operation of the Order, and a significant amount of product was destroyed. Financial

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losses were nearly \$3 million, and there was also a significant impact on goodwill with retailers that had previously marketed the UglyRipe™.

In November 2004, Santa Sweets again requested a Certificate of Privilege based upon the company's anticipated participation in the Identity Preservation Program. In February 2005, the Under Secretary of Agriculture, Marketing and Regulatory Programs, met with the FTC to discuss the Santa Sweets' request and the Identity Preservation Program. No formal action was taken at that time and no vote of the Committee was taken during the 2004-2005 regulated season on the Santa Sweets request.

Santa Sweets devoted significant resources to achieve Identity Preservation Program status during the remainder of 2005. A highly detailed technical manual was developed and reviewed at several stages with USDA program officials. On-site visits were made by USDA to Santa Sweets locations. Documentation was reviewed and revised many times. Development of the program cost more than \$100,000, and the company estimates that annual operating costs for the program, including audit and inspection fees paid to USDA, will be over one hundred thousand of dollars. At the same time, Santa Sweets, the Florida Tomato Committee, and the Florida tomato industry can now have the assurance through USDA certification, inspection, and audit, that the UglyRipe™ is what it says it is.

Tomatoes Subject to the Florida Tomato Order

Since 1987, tomatoes shipped from Florida during the Florida Tomato Season, October 10 through the following June 15, have been required to be graded as U.S. No. 1, U.S. Combination, or U.S. No 2 under the U.S. Standards for Grades of Fresh Tomatoes. When not more than fifteen percent (15%) of tomatoes in any lot fail to meet the requirements of U.S. No. 1 grade *and* not more than one-third of the fifteen percent, *i.e.*, five percent (5%) of the lot are comprised of defects causing very serious damage (including not more than one percent (1%) of the lot which are soft or affected by decay), such tomatoes may be shipped and designated as at least 85% U.S. No. 1 grade.

Of particular importance to the distribution of the UglyRipe™ are the requirements for U.S. No. 2 that tomatoes be "well developed", "reasonably well formed" and "not more than slightly rough." UNITED STATES STANDARDS FOR GRADES OF FRESH TOMATOES § 51.1857(a)(5)-(7). As the Committee is aware, the characteristics of UglyRipe™ do not permit the variety to meet this grade standard in an economically viable manner.

Proposed Change To The Marketing Order

Marketing Order 966 is contained in Title 7 of the Code of Federal Regulations. There exists already an exemption from the grade standard for particular types of tomatoes. This submission

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seeks to have the Florida Tomato Committee amend that exemption to include any tomato certified under the Identity Preservation Program. The exemption language of the regulation, with the amending language shown italic and bold type, *thus*, and language to be deleted struck through, ~~thus~~, follows:

(d) Exemption--(1) For types. The following types of tomatoes are exempt from these regulations: Elongated types commonly referred to as pear shaped or paste tomatoes and including but not limited to San Marzano, Red Top, and Roma varieties; cerasiform type tomatoes commonly referred to as cherry tomatoes; hydroponic tomatoes; ~~and~~ greenhouse tomatoes; *and tomatoes produced under the Identity Preservation Program under such conditions as are specified by the Secretary.* Specialty packed red ripe tomatoes, yellow meated tomatoes, and single layer and two layer place packed tomatoes are exempt from the container net weight requirements specified in paragraph (a)(3)(i) of this section, and the requirement that each container or lid shall be marked to indicate the designated net weight as specified in paragraph (a)(3)(ii) of this section, but must meet the other requirements of this section. Producer field-packed tomatoes must meet all of the requirements of this section except for the requirement that all containers must be packed at registered handler facilities as specified in paragraph (a)(3)(ii) of this section, and the requirement that such tomatoes designated as size 6 x 6 must meet the maximum diameter requirement specified in paragraph (a)(2)(i) of this section: Provided, That 6 x 6 and larger is used to indicate the listed size designation on containers.

7 C.F.R. § 966.323 (with proposed amendment).

Santa Sweets are not seeking exemption from any other standard governing defects.

The Florida Tomato Industry Will Benefit from Amending the Marketing Order

The Florida tomato industry will benefit from this amendment to the Marketing Order. The UglyRipe™ will compete against greenhouse and other specialty tomatoes that are presently encroaching on Florida products in the produce section. At the same time, the UglyRipe™ does not compete directly against Florida mature green tomatoes. Amendment of the Florida Tomato Order to permit distribution of other specialty tomatoes under USDA's Identity Preservation Program, will demonstrate the Florida tomato industry's commitment to innovative marketing of its products.

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We respectfully request that the Committee act on this request within the next fifteen days.

Sincerely,

A handwritten signature in cursive script, reading "Joseph Procacci".

Joseph G. Procacci
Chairman of the Board

cc: Hon. Charles F. Conner
Deputy Secretary

Hon. Lloyd C. Day
Administrator, Agricultural Marketing Service

Robert C. Keeney
Deputy Administrator, Fruit and Vegetable Programs